

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of)	
)	
Request for Review of the)	CC Docket No. 02-6
)	CC Docket No. 96-45
Decision of the)	
Universal Service Administrative Company)	File No. _____
)	
By)	
)	
Cherokee County School District)	
)	

To: Office of the Secretary, FCC
Attention: The Chief, Wireline Competition Bureau

REQUEST FOR REVIEW

Pursuant to §54.719(c) of the Rules of the Federal Communications Commission ("Commission"), Cherokee County School District ("Cherokee") respectfully requests review of the February 11, 2010 Rejection ("Rejection") (attached as Exhibit A hereto) by the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") of Cherokee's Form 500 requesting cancellation of FRNs 1757834, 1758846, 1759871, 1759787, 1758563, 1759708, 1759911, 1760217, 1758668, 1759746, 1759991, 1758759, 1759840, and 1760182 for FCC Funding Year 11 (2008-2009) ("Form 500") (attached as Exhibit B hereto).

Billed Entity Number 127111
Service Provider: Professional Network Consultants, Inc. ("PNC")
Service Provider Spin: 143025074
Applicant Form Identifier: CC08-50001
Application Number 669318

SLD claimed in the Rejection that its decision was based on the fact that Cherokee failed to provide requested information. Megan Allred of SLD later claimed that, in fact, the decision was based on the fact that Cherokee “can not cancel the FRNs because payments have already been made on the FRNs.”¹ Ms. Allred went on to say, “If you wish to cancel the FRNs you first need to return funds to USAC and then once funds have been returned you can cancel the FRNs.”²

As a practical matter, Cherokee can not return the funds to USAC, because Cherokee neither received any of the funds nor did it receive any of the benefits from the funds.³ All funds were paid to Cherokee’s service provider, Professional Network Consultants, Inc. (“PNC”), which provided no benefit to Cherokee. Cherokee sought cancellation of the FRNs because, as reflected in the cover letter that accompanied its Form 500 (attached hereto as Exhibit D), an internal audit by Cherokee initially indicated that PNC had violated the E-rate rules and that funding was no longer appropriate. It is impossible for Cherokee to actually return the funds, all of which were disbursed by SLD directly to PNC. It is also inequitable to demand that Cherokee remit funds to USAC in order to obtain cancellation of the FRNs because Cherokee neither received any of the funds nor any of the benefits from the funds.⁴

Based on further research conducted by Cherokee, it appears that PNC: (i) had improper contact with Cherokee both prior to and after the Form 470 was filed, and prior to the award on the contract pursuant to that Form 470; (ii) submitted Forms 474 for reimbursement from the

¹ E-mail from Megan Allred to Jeana Hardin dated February 1, 2010. (Attached as Exhibit C hereto).

² See Exhibit C.

³ The only equipment PNC ever installed for Funding Year11 was the call manager server to serve Mountain Youth School, Peachtree Elementary School and Cherokee’s Network Operations Center. Cherokee has paid PNC the full amount of the previously identified undiscounted amount for the call manager. Cherokee has tried to re-pay the SLD the discounted amount for the call manager server but no mechanism exists for such payment until the grant of this appeal. Cherokee will pay the full amount of the undiscounted portion of the call manager upon grant of this appeal.

⁴ Except for the call manager discussed in n. 3.

SLD prior to invoicing Cherokee; (iii) submitted Forms 474 for reimbursement from the SLD prior to performing the work reflected on the Form 474; (iv) submitted Forms 474 for reimbursement from the SLD prior to delivering equipment that the Form 474 stated was delivered; (v) obtained reimbursement from the SLD for services it never provided; and (vi) submitted requests for reimbursement from the SLD in amounts greater than specified by the contract it signed with Cherokee. Accordingly, pursuant to the Commission's *Order on Reconsideration and Fourth Report and Order*, CC Docket Nos. 96-45, 97-21, 02-6, 19 FCC Rcd 15252 (2004) ("Fourth Report and Order"), and *Schools and Libraries Fifth Report and Order*, CC Docket No. 02-6, 19 FCC Rcd 15808 (2004) ("Fifth Report and Order") the above referenced FRNs should be cancelled and the funds disbursed to PNC should be recovered from PNC.

Historical Background

Cherokee County Schools is a rural district comprised of 14 schools serving approximately 3,500 students and is located in the westernmost tip of North Carolina. Cherokee and PNC had entered into several technology agreements for more limited E-rate services for funding years previous to Funding Year 11, the year at issue in this appeal.⁵ In February 2007, Cherokee County submitted a Form 470 (Form 470 #522740000611516) for internal connections. Pursuant to the Form 470 522740000611516, PNC was awarded a contract to install internal connections.⁶ Based on the Federal Free and Reduced Lunch data, Cherokee County, as a whole, was a 79% discount district, although Mountain Youth and Peachtree were

⁵ On February 2, 2005 the State of North Carolina accepted Cherokee's Technology Plan. In January 2008, Cherokee amended the Technology Plan to include an implementation of VoIP services. See E-mail from Terelle Beaver to Anthony Martin, dated May 20, 2008. (Attached as Exhibit E hereto).

⁶ Cherokee's Network Operations at Marble Elementary School and Andrews Elementary School had installed VoIP in August of 2007 as a pilot program using local funding.

90% discount schools. Cherokee was awarded E-rate funding (FCDL April 15, 2008, for FRN 1622015, FRN1622005), for internal connections for Mountain Youth and Peachtree, respectively. Cherokee's request for internal maintenance for the entire county was denied because it did not qualify for Priority II funding on a county-wide basis (FCDL April 15, 2008, for FRN 1622127) (attached hereto as Exhibit F). PNC completed installation of the internal connections at Mountain Youth and Peachtree in August 2008.

When Cherokee was denied Priority II funding for the maintenance of its internal connections throughout the county, Phillip Colvard, PNC's account representative to Cherokee County Schools, advised Cherokee that it could qualify for Priority II funding if it would utilize individual school surveys instead of relying on the Federal Free and Reduced Lunch data.⁷ While Cherokee was formulating its Form 470, Mr. Colvard provided additional information to Cherokee employees on how to qualify for Priority II funding by using individual school surveys, and the additional service Cherokee could request in its Form 470 when it qualified for Priority II funding.⁸ In fact, Mr. Colvard was apparently assisting Cherokee WAN Engineer/Interim Director of Technology, Anthony Martin, during the actual completion of the Form 470 online.⁹

⁷ See Affidavit of Jeana Hardin (attached hereto as Exhibit G), ¶ 3. E-mail chain with E-mail from Leonard Winchester to Phillip Colvard, dated November 15, 2007, and E-mail from Phillip Colvard, dated November 16, 2007. (Attached as Exhibit H hereto.) (Stating that "PNC and Doris Sparks were mentioned as helping districts raise their reimbursement percentage (Cherokee & Graham) using the school lunch program data but comparing it to the number of forms returned instead of the total student population.") In Exhibit H, Phillip Colvard, of PNC, states that Leonard Winchester "sent this email to me saying that *we* did our E-rate forms wrong for Cherokee County Schools." (Emphasis added). On December 13, 2007, Phillip Colvard sent an E-mail to Anthony Martin discussing what discount percentage a school would need to get Priority II funding. E-mail from Phillip Colvard to Anthony Martin dated December 13, 2007, forwarding E-mail from Barb Kelly to Phillip Colvard, Dan Whitt and Jeff Gaura. (Attached as Exhibit I hereto.).

⁸ See Hardin Aff., ¶ 3.

⁹ See E-mail chain E-mail from Phillip Colvard to Anthony Martin, dated January 3, 2008, E-mail from Anthony Martin to Phillip Colvard, dated January 3, 2008, and e-mail from Phillip Colvard to Anthony Martin, dated January 3, 2008. (Attached as Exhibit J hereto.) In this chain of emails, Mr. Martin requests assistance from PNC's Colvard with the Form 470. Mr. Colvard supplied the SLD URL for the Form 470. Mr. Martin then asks for further assistance from Doris Sparks, technology director of the Mitchell County School system, who PNC's Colvard told

On January 4, 2008, Cherokee filed its Form 470 (attached hereto as Exhibit L) requesting internal connections for the entire county as well as for maintenance of internal connections for the entire county. From January 23, 2008 through January 30, 2008, Anthony Martin distributed and collected survey forms to ascertain the county's discount level.¹⁰ On February 6, 2008, while the survey forms were being collected and tabulated by Mr. Martin and the Cherokee staff, but prior to the execution of any contracts or the filing of the Form 471, PNC's Phillip Colvard assisted with the tabulation of the surveys.¹¹ At this time, Cherokee and PNC had not signed a contract¹² Based on Mr. Martin's tabulation of the survey results, Cherokee filed its Form 471 (#624508) and certified that the entire district was entitled to a 90% discount rate. On March 24, 2009, FCDL CCS471Y11 was issued for the above-referenced FRNs.

PNC employees were put on notice about Cherokee's problems verifying its discount rate multiple times. As early as February 24, 2009, Jeana Hardin, Director of Instructional Technology and Public Relations for Cherokee, met with PNC President Gaura and voiced her concern over Cherokee's ability to qualify for the 90% discount rate.¹³ On April 16, 2009,

Randy Starnes he had paid out of his own pocket to assist Cherokee's Martin with the Form 470 completion. See Affidavit of James R. Starnes (attached as Exhibit K hereto), ¶ 5.

¹⁰ See Starnes Aff., ¶ 6; Affidavit of David L. Cornwell (attached as Exhibit M hereto), ¶ 7; Hardin Aff., ¶ 4; Affidavit of Terelle Beaver (attached as Exhibit N hereto), ¶ 6.

¹¹ See E-mail from Phillip Colvard to Anthony Martin, dated February 4, 2008, (attached as Exhibit O hereto) in which Mr. Colvard asks Mr. Martin about the status of surveys and notes that he will be at the facility on February 6.

¹² There is nothing in the record that shows that PNC submitted a bid that was accepted prior to February 7, 2008. See Exhibit O; E-mail from Phillip Colvard to Anthony Martin, dated February 6, 2008 (Attached hereto as Exhibit P.); E-mail from Phillip Colvard to Jeana Hardin, dated March 7, 2008 (Attached hereto as Exhibit Q.); E-mail from Phillip Colvard to Anthony Martin and Jeana Hardin, dated April 7, 2008 (Attached hereto as Exhibit R.); E-mail from Phillip Colvard to Jeana Hardin, dated April 13, 2008 (Attached hereto as Exhibit S.); E-mails from Terelle Beaver to Jeana Hardin and Anthony Martin, dated May 3, 2008 (Attached hereto as Exhibit T.); E-mail from Anthony Martin to Jeff Gaura, dated May 8, 2008 (Attached hereto as Exhibit U.); and E-mail from Anthony Martin to Terelle Beaver dated May 20, 2008. From this E-mail, it appears that there was no agreement on the terms and conditions of the service prior to May, 2008 (Attached hereto as Exhibit V.).

¹³ See Hardin Aff., ¶¶ 13, 14. During the meeting, at which Mr. Gaura brought up PNC's dissatisfaction in not being selected as a vendor for Funding Year 12, he requested a change of vendor by the district to PNC. Mr. Gaura

representatives from Cherokee and PNC met to discuss the status of the project.¹⁴ At the meeting, PNC was advised by Cherokee that there were questions about the 90% discount rate and PNC was asked to hold off on the project until Cherokee could verify its discount status. Mr. Colvard from PNC agreed to hold off on the project.¹⁵ However, Mr. Colvard represented at that meeting that unless Cherokee filed a Form 486, Cherokee would lose its phone service at the Mountain Youth and Peachtree schools.¹⁶ Mr. Colvard further represented to Jeana Hardin, the Cherokee Technology Director that the phone licenses for a call manager server that had been installed to serve Peachtree and Mountain Youth Schools would expire unless the Form 486 was filed.

On April 20th, 2009, Cherokee asked the North Carolina Department of Public Instruction (“DPI”) to conduct an “attestation examination” to verify the results of the surveys Mr. Martin conducted.¹⁷ Also on April 20, 2009, Cherokee filed its Form 486 for the above-referenced FRNs, based solely upon (i) the representation from Mr. Colvard that the installed and operating phone systems that had been funded pursuant to FRN # 1622015 and FRN 1622005 at Mountain Youth and Peachtree schools, respectively, would be turned off if a Form 486 was not filed, and (ii) the assurance from Mr. Colvard that PNC would take no action on the rest of the project until Cherokee could verify its discount level.¹⁸ Very soon thereafter, PNC provided the

stated that if Cherokee would change the vendor to PNC, Cisco would not require the return of the Call Manager and Cherokee’s VoIP licenses could be extended, which, together, would ensure Cherokee experienced no break in service.

¹⁴ At the meeting Chief Executive Officer and President Jeff Gaura, Chief Financial Officer Dan Whitt, regional sales representative Phillip Colvard attended for PNC and Superintendent Dr. Stephen Lane, Ed.D., Cherokee Chief Financial Officer Terelle Beaver, and Jeana Hardin attended for Cherokee

¹⁵ See Hardin Aff., ¶ 16.

¹⁶ See Hardin Aff., ¶ 16.

¹⁷ On April 29, 2009, the DPI reported that it was not able to validate Mr. Martin’s results See E-rate Simulated Audit Report dated April 29, 2009. (Attached as Exhibit V hereto).

¹⁸ See Hardin Aff., ¶ 17.

information needed by Cisco Systems to extend the license manager that would ensure continued service at Peachtree and Mountain Youth schools.¹⁹

On April 23, 2009, when PNC reportedly submitted its Form 474, PNC attested that it had provided services to Cherokee and had installed internal connections for Cherokee. The Form 474 was submitted just seven days after Mr. Colvard had agreed to await the results of the DPI investigation and only three days after Cherokee had submitted its Form 486. PNC certified, “subject to penalties for false statements, including fine or forfeiture, under the Communications Act, 47 U.S.C. §§ 502, 503(b)” that it had performed the installation of internal connections, performed maintenance on those internal connections and invoiced Cherokee for the services rendered. In fact, on the date that PNC filed the Form 474, PNC had delivered no equipment, performed no services and submitted no invoices to Cherokee.²⁰ It is Cherokee’s understanding that on April 27, 2009, PNC received \$1,761,502.18 in funding from SLD and that PNC subsequently received additional funds from SLD totaling \$77,693.55 through July of 2009.

Beginning on May 1, 2009, PNC began delivering equipment, which delivery was not anticipated by Cherokee. None of this equipment was accepted by Cherokee, which has never opened any boxes, provisioned or otherwise utilized in any manner the equipment that PNC unilaterally chose to acquire and deliver.²¹ On May 28, 2009, alarmed at the amount of Cisco boxes that had arrived, Jeana Hardin and Terelle from Cherokee met with Dan Whitt, and engineers Mike Kelly and Vitale Grueben and advised them that the project could not go forward

¹⁹ See April 23, 2008, E-mail from David Crowell to Jeana Hardin, attached hereto as Exhibit W, stating that “PNC should have everything they need to extend this license until we get the new hardware/software ordered. I got this approved yesterday and forwarded to [PNC employees] Jeremy and Phillip last night.”

²⁰ See Hardin Aff., ¶ 21.

²¹ See Lane Aff., ¶¶ 9, 10. Cherokee has at all times secured and preserved the equipment for PNC.

without the 90% discount rate and that there were concerns about the 90% discount rate.²² When Ms. Hardin asked if PNC would abstain from advancing the project until Cherokee finished researching the validity of the 90% discount rate, or if she would have to file a Form 500 to cancel the funding requests, Mr. Whitt stated that PNC would work with Cherokee and asked Ms. Hardin not to file a Form 500.

On June 1, 2009, Cherokee's Superintendent, Dr. Stephen Lane, sent a certified letter formally directing PNC to cease moving forward with the project.²³ PNC's Dan Whitt responded with a letter dated June 10, 2009, stating that PNC did not know about the problems with Cherokee's discount rate and that it intended to hold Cherokee liable for all products and services it would have provided had Cherokee been approved at a 90% rate.²⁴ Mr. Whitt wrote an E-mail to Jeana Hardin two weeks later that took a different position. He stated that PNC could install call manager products "without having to schedule anything beyond that," and that "we have not been advised by legal counsel nor have we communicated to CCS that we have to do all of the E-rate project or nothing."²⁵ In the June 24, 2009 E-mail, Mr. Whitt indicated that PNC did not want "some kind of an all-or-nothing outcome."²⁶ Whitt also implied that PNC would attempt to hold Cherokee liable only for the costs of the call manager equipment and licenses: "If at some point down the road everything falls apart with this year's E-rate funding then CCS would at that point be liable for the USAC portion of whatever product and labor we spent toward the Call

²² See Hardin Aff., ¶ 22; Beaver Aff., ¶ 20.

²³ See June 1, 2009 Letter from Stephen Lane to Jeff Gaura, (Attached hereto as Exhibit X.)

²⁴ See June 10, 2009 Letter from Dan Whitt to Stephen Lane. (Attached hereto as Exhibit Y.)

²⁵ E-mail from Dan Whitt to Jeana Hardin, dated June 24, 2009. (Attached hereto as Exhibit Z.)

²⁶ See Exhibit Z.

Managers that USAC has already paid for.”²⁷ Jeff Gaura and Phillip Colvard were copied on this E-mail. PNC has taken an entirely different position since that time.²⁸

On June 11, 2009, Cherokee hired Funds for Learning (“FFL”) to conduct a review of the discount rates listed on Cherokee’s FY 2008 and 2009 E-rate applications. Jeana Hardin advised Mr. Colvard that FFL had been hired to review the Cherokee’s discount rate during the first week of June 2009²⁹. On June 15, 2009, with the assistance of FFL, Dr. Lane published a Services Certification Request attempting to freeze any more funds from being disbursed.³⁰

On September 15, 2009, by email attachment, Cherokee began receiving invoices from PNC for internal connections, for which Cherokee had advised PNC on a number of occasions that it might not qualify. On October 23, 2009, FFL concluded its report on Cherokee’s discount amount and concluded that it could not support a 90% discount.³¹ On November 6, 2009, an envelope containing a year of PNC basic maintenance invoices for the period July 1, 2008 through June 30, 2009, was dropped in the lobby of Cherokee’s Network Operations building.³² For Funding Year 11, except for the call manager server to serve Mountain Youth School, Peachtree Elementary School and Cherokee’s Network Operations Center, no internal connections were installed by PNC and no maintenance service was performed on internal connections.

On December 8, 2009, PNC’s President Jeff Gaura, Dan Whitt and Phillip Colvard were invited to meet with Cherokee to determine a course of action regarding the return of funds

²⁷ See Exhibit Z. PNC has unfortunately undertaken an entirely different position since that time.

²⁸ At the time of this E-mail, Cherokee had still not received a single invoice from PNC. See Hardin Aff. ¶ 16.

²⁹ See Hardin Aff., ¶ 23.

³⁰ See Letter from Stephen Lane to the SLD, dated June 15, 2009. (Attached hereto as Exhibit AA.)

³¹ FFL Report, dated October 23, 2009. (Attached hereto as Exhibit BB.)

³² Hardin Aff., ¶ 26.

obtained from the SLD by PNC and the return of the equipment wrongfully delivered to Cherokee by PNC.³³ Dr. Lane reported that, as suspected, the 90% discount rate could not be supported after thorough examination through an internal Cherokee audit, an audit by the North Carolina Department of Public Instruction, and an audit by the compliance firm Funds for Learning.³⁴ At the time of the meeting, PNC had received \$1.8 million in funding from SLD. Dr. Lane explained that the funds would need to be returned by PNC and that Cherokee would have to pay the full undiscounted rate for the call manager and associated installation at Mountain Youth School, Peachtree Elementary School and the Network Operations Center. Jeff Gaura indicated that PNC would need some time to identify how the company could financially work through the situation.³⁵ At the conclusion of the meeting, Cherokee and PNC agreed to schedule a meeting to discuss how the SLD would be paid back for a date in December before Cherokee's Christmas break.

On December 18, 2009, Cherokee had a conference call with PNC, the purpose of which was to be a discussion of how the funds could be returned to SLD.³⁶ When Cherokee was advised by PNC that it had legal counsel on the call, Dr. Stephen Lane, Cherokee's Superintendent, terminated the call.³⁷ On January 6, 2010, the undersigned counsel, who was familiar with the E-rate rules, was retained by Cherokee. On January 11, 2010, Cherokee filed the subject Form 500 seeking to cancel the above-referenced FRNs.

Obligation to Repay

³³ See Affidavit of Stephen Lane (attached hereto as Exhibit CC) ¶ 11.

³⁴ See Lane Aff., ¶ 12.

³⁵ See Lane Aff., ¶ 14.

³⁶ On the call were Terelle Beaver, Jeana Hardin, Chris Douglas and Dr. Lane from Cherokee and Jeff Gaura, Phillip Colvard and Bennett Ross from PNC. See Lane Aff., ¶ 15.

³⁷ See Lane Aff., ¶ 15.

Pursuant to the *Fifth Report and Order*, “[a]mounts disbursed in violation of the statute or a rule that implements the statute or a substantive program goal must be recovered in full.” *Fifth Report and Order* at ¶20. Funds are required to be recovered, *inter alia*, for: competitive bidding violations; discount calculation errors; and for waste, fraud and abuse. *See Fifth Report and Order* at ¶¶ 21, 27 and 29. Although the Commission determined in the *Fourth Report and Order* that the recovery action should be directed to the party that committed the rule or statutory violation in question³⁸, the Commission directed USAC to “consider which party was in a better position to prevent the statutory or rule violation and which party committed the act or omission that forms the basis for the statutory or rule violation.”³⁹

Cherokee concedes that the E-rate rules were violated; however, in all instances PNC was the party that was in a better situation to prevent the violation. Moreover, Cherokee has neither received any funds from the SLD, nor any benefit⁴⁰ from the funds disbursed to PNC. Accordingly, the improperly disbursed funds should be recovered from PNC and the above referenced Form 500 should have been accepted by the SLD.

It appears that the following rule violations were committed with regard to the funds disbursed pursuant to the above referenced FRNs: (i) Competitive Bidding; (ii) Discount Calculation; (iii) improperly certified Form 486; (iv) submission of a Form 474 prior to the equipment being delivered or services rendered; (v) failure to properly invoice the Billed Entity and (vi) receipt of funds for services not performed. Each violation is discussed below.

Competitive Bidding Requirements: Sections 54.504 and 54.511 of the FCC’s rules prohibit involvement of a Service Provider in the preparation of the Form 470 and prohibit a

³⁸ *Fourth Report and Order* at ¶10

³⁹ *Fourth Report and Order* at ¶ 15

⁴⁰ Except for the call manager for three locations mentioned earlier.

Service Provider from having greater access to the Billed Entity than potential competitors.⁴¹ As described above, Phillip Colvard, an employee of the service provider, assisted Cherokee with the preparation of the Form 470 and on matters relating to the appropriate discount level and the bid for Priority II services. Phillip Colvard also was involved in meetings over the administration of the discount surveys between the issuance of the Form 470 and prior to the acceptance of its bid and prior to the filing of the Form 471. These contacts between PNC and Cherokee prior to the creation of Form 470 and prior to the filing of the Form 471 violate the Commission's Competitive Bidding requirements. It was the concern over these improper contacts which formed a partial basis for the above-referenced Form 500.⁴²

While it is often true that bidding violations are within the control of the Billed Entity, such is not the case here. Cherokee's E-rate program was being administered by Anthony Martin in his capacity as WAN Engineer and Interim Technology Director. Cherokee ultimately determined that Mr. Martin did not have a very extensive understanding of the E-rate program and that he was essentially relying on PNC's Mr. Colvard for advice and direction.⁴³ PNC, on the other hand, holds itself out as an expert in the E-rate program. Mr. Colvard, given his experience and expertise in the area, should have known that his contacts with the Cherokee staff during these periods were impermissible.⁴⁴ It was PNC's improper contact and assistance which

⁴¹ See, e.g., *Requests for Review of Decisions of the Universal Service Administrator by Caldwell Parish School District, et al., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 02-6, 23 FCC Rcd 2784 (2008) ("Caldwell Parish Order"); *Request for Review by MasterMind Internet Services, Inc., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 96-45, 16 FCC Rcd 4028, (2000) ("MasterMind Order")

⁴² At the time the Form 500 was filed, Cherokee had also determined that it was not entitled to Priority II funding.

⁴³ Mr. Martin was ultimately terminated by Cherokee County, in large part because of his lack of expertise in this area. See Lane Aff., ¶ 7.

⁴⁴ Mr. Colvard's statement to Randy Starnes that he paid Doris Sparks out of his own pocket to assist Cherokee with its Form 470 and the preparation of the surveys gives the appearance that Mr. Colvard knew of the restrictions on contact and was attempting to subvert them.

created the violation of the Competitive Bidding rules, and it certainly was the party that was in a better position to prevent the violation of the Competitive Bidding Rules. The refund of these funds should come from PNC.

Calculation of Discount Percentage: When applicants fail to calculate their discount properly, the amount disbursed in violation of the rule is the difference between the support the beneficiary is allowed and the amount provided.⁴⁵ Where the appropriate calculation no longer justifies Priority II funding, the entire amount disbursed may be in violation of the rules. Prior to 2007, Cherokee determined its discount percentage using the Federal Free and Reduced Lunch data. In 2007, after Cherokee was denied Priority II funding for the maintenance of its internal connections, it was contacted by PNC's Mr. Colvard who advised Cherokee to conduct surveys as a way to increase the discount percentage. PNC advised Cherokee's Mr. Martin on how to conduct and tabulate the survey. Mr. Martin relied on the advice provided by PNC and determined, based on that advice, that Cherokee met the 90% threshold. When PIA conducted a review of the applicable Form 471, PNC assisted with support for the survey results as well as other inquiries from PIA.⁴⁶ Mr. Gaura, the President of PNC, without Cherokee's knowledge or consent, even spoke with SLD personnel about Cherokee's review. When, after an internal review, Mr. Martin could not duplicate the survey results obtained by Mr. Martin, Cherokee advised PNC that it might not qualify for the 90% discount, and that it would not therefore qualify for Priority II funding. Despite knowing that Cherokee's right to obtain Priority II funds was in question, PNC continued to proceed in all its respects with the SLD as if Cherokee could support a 90% discount. As soon as Cherokee conclusively determined that the 90% discount

⁴⁵ *Fifth Report and Order* at ¶27.

⁴⁶ See E-mail chain with E-mail from Anthony Martin to Jeff Gaura, dated October 27, 2008 and E-mail from Jeff Gaura to Anthony Martin, dated October 27, 2008. (Attached hereto as Exhibit DD.)

rate could not be supported, it advised the SLD.⁴⁷ Given PNC's integral involvement with the administration and tabulation of the surveys, and its actions which affirmatively sought funding from the SLD for Priority II Service, even after it was aware that the discount rate could be in error, PNC was the party in a better position to prevent the violation. PNC was also the party that drew down \$1.8 million in Priority II E-rate funds even though it knew that Cherokee might not be entitled to Priority II funds. PNC remains in possession of the \$1.8 million. Cherokee has received no portion of those funds, nor has it received any benefit⁴⁸ from those funds. The recovery of those funds should come from PNC.

Form 486: Cherokee should not have submitted the Form 486. On the Form 486 the applicant certifies that:

"I certify that the services listed on this Form 486 have been, **are planned to be**, or are being provided to all or some of the eligible entities identified in the Form 471 application(s) cited above. I certify that there are signed contracts covering all of the services listed on this Form 486 except for those services provided on a tariff or month-to-month basis. I certify that I am authorized to submit this receipt of service confirmation on behalf of the above-named Billed Entity; that I have examined this request; and that, to the best of my knowledge, information, and belief, all statements of fact contained herein are true" (emphasis supplied)"

Cherokee believed the services were "planned" because once the discount was validated Cherokee intended to go through with the project. Cherokee, however, had been withholding submission of the Form 486 until it could validate its discount percentage. Cherokee filed the

⁴⁷ The Form 500 that is the subject of this appeal was based in part on Cherokee's determination that it could not support the 90% discount rate, and therefore was not entitled to Priority II funding. Cherokee maintains that its incorrect calculation of the discount rate was due in part to the influence and contacts exercised by PNC in violation of the rules. For the other pending FRNs that did not involve PNC services or Priority II Services, Cherokee submitted a Form 500 asking that the discount rate be revised. See Exhibit B.

⁴⁸ Cherokee has received the benefit of a call manager and related licenses, the undiscounted portion of which it has paid to PNC and the discounted portion of which it intends to pay to SLD.

Form 486 only after PNC's insisted that it would turn off the existing, previously installed, phone service unless the Form 486 was filed. As shown above, on April 16th, Cherokee advised PNC that it might not be entitled to Priority II funding. At that time PNC knew, or should have known that, a Form 486 for the above-referenced FRNs could not be filed because the Priority II services could not be performed under the E-rate program. PNC knew, Cherokee was withholding the Form 486 until the discount percentage question could be definitively resolved. As described above, on April 16, 2009, at a meeting with PNC and Cherokee personnel, Cherokee reiterated that it could not verify the 90% discount. PNC, however, knowing full well that it was improper to file a Form 486 for Priority II funds when the discount percentage could not be verified told Cherokee that if Cherokee did not file the Form 486, PNC would turn off the trial call manager that was installed with funds from the previous year. Cherokee told PNC at that meeting that it would file the Form 486 to prevent disruption of the already approved phone service, but asked PNC to standstill on the delivery and installation of the new Priority II services. The PNC representative agreed to the standstill and on April 20, 2009 Cherokee filed the Form 486. Seven days later PNC filed Form 474 for the Priority II project and the FCC records indicate that over \$1.8 million was disbursed to PNC for the delivery, installation, and maintenance of the Priority II services described in the above-referenced FRNs. None of the equipment referenced in the Form 486 was ever installed by PNC, and PNC performed none of the Priority II maintenance referenced in the Form 486. Cherokee should not have submitted the Form 486 because: (i) the services listed on the Form 486 were not planned to be provided until the discount percentage could be verified; and (ii) no services were being provided to any of the eligible entities identified in the Form 471 application. However, Cherokee was induced to file the Form 486 based on the assertions and representations by PNC. As such, the party in the best position to

prevent the rule violation was PNC because it knew that the Form 486 should not have been filed if the 90% discount could not be verified. PNC received 100% of the funds disbursed by SLD. Cherokee received none of the benefits⁴⁹ from the funds disbursed by the SLD. The funds should be recovered from PNC.

Form 474: The Instructions for Completing the Universal Service for Schools and Libraries Service Provider Invoice Form, published April 2007 provide in pertinent part:

- The service provider must have provided the service and given a discounted bill to the applicant prior to submitting the Form 474. (Introduction);
- The service provider may file the Service Provider Invoice Form seeking reimbursement of discounts provided pursuant to an approved FRN upon the **occurrence of all** of the following conditions: (emphasis supplied)
 - upon receipt of an acknowledgment from USAC that the billed entity applicant has filed a Form 486, Receipt of Services Confirmation Form;
 - upon providing discounted, eligible services to an eligible school, school district, library, library consortium or consortium of multiple entities on or after the effective date of the discounts as set forth in USAC's acknowledgement of receipt of Form 486;
 - after billing the Form 471 recipient of an FCDL for eligible services, showing the total prediscount amount, the discounted portion and the applicant's obligation to pay the undiscounted amount;
 - after the service provider completes and submits its Annual Service Provider Certification Form, FCC Form 473, to USAC; and
 - no later than 120 days after the end of the pertinent funding year service delivery period. The delivery period for recurring services is generally July 1 through June 30 of the following year; the period for non-recurring services is generally from July 1 through September 30 of the following year. See USAC's at www.usac.org/sl for specific information about invoice due dates.
- **Item (6) - Invoice Date to USAC.** Provide the date that the service provider completed and mailed or electronically transmitted this form to USAC. Please note that **this date is expected to be later than the date that the service provider submitted the bill** to the school or library pursuant to an FRN for the eligible services. (emphasis supplied)

⁴⁹ Except for the call manager

- **Column (11) - Customer Billed Date.** The Customer Billed Date (mmyyyy) is the month and year of the bill submitted by the service provider to its customer and upon which this Service Provider Invoice Form is based. This column should be completed for invoices that are provided to customers for eligible services billed as part of a recurring, regular billing cycle; that is, for bills provided to customers on either a monthly or quarterly basis.
- **Column (12) - Shipping Date to Customer or Last Day of Work Performed.** This column should be completed for a bill/invoice issued to a customer:
 - for eligible services and/or products delivered on a one-time non-recurring basis, AND
 - when the customer/service provider billing relationship is based on the service provider's submission of the bill/invoice for all charges due from the customer for eligible services/products, OR
 - the customer/service provider billing relationship is based upon the **last** day of work performed.

Completion and filing of the Form 474 is wholly within the Service Provider's control.

No funds would have been disbursed unless and until the Form 474 was filed. PNC submitted the Form 474: (i) before the work was performed; (ii) before the equipment was delivered; and (iii) before Cherokee received any invoices. PNC's representations on the Form 474 were therefore wholly fictitious. PNC's misrepresentations on the 474 were rule violations solely by PNC, and PNC was the party in the best position to prevent the rule violation.⁵⁰ No funds would have been disbursed to PNC if it had not filed a Form 486. The sole reason that the funds were disbursed in violation of the rules was because PNC knowingly submitted a false Form 486. The funds should be recovered from PNC.

Improper Invoices: The FCC rules require a service provider to certify that it has delivered invoices to the billed entity (upon which the invoices it submits to the Commission will be based) prior to filing a Form 474. Although PNC did make some equipment deliveries during the window of May 1 and May 28, PNC never installed any equipment. Nor has PNC performed

⁵⁰ The Form 474 also contains the following certification: "Anyone filing false information is subject to penalties for false statements, including fine or forfeiture, under the Communications Act, 47 U.S.C. §§ 502, 503(b), or fine or imprisonment under Title 18 of the United States Code, 18 U.S.C. § 1001."

any maintenance on any equipment covered by the FRNs. Cherokee, moreover, received no invoices from PNC until September 2009. When Cherokee finally received the invoices from PNC they contained charges for services that were never rendered. As discussed above PNC submitted its Form 474, despite the fact that PNC had not provided Cherokee with any invoices. Moreover, the invoices PNC later submitted to USAC could not possibly be based on invoices PNC had submitted to Cherokee as PNC had not submitted any invoices to Cherokee when it invoiced USAC. PNC's actions clearly violated the FCC rules, and PNC, and only PNC, was in a position to prevent the rule violation. The funds should be recovered from PNC.

Improper Receipt of Funds: PNC has received approximately 1.8 million dollars pursuant to the above-referenced FRNs. These funds were disbursed by the SLD based on the representations of PNC that it had installed and maintained internal connections pursuant to the FRNs. However, no internal connections have been installed and there has been no maintenance under the FRNs. PNC should never have received the funds because they had no legal right to the funds. Only PNC was in a position to accurately certify the services it performed, and only PNC took receipt of 1.8 million dollars for which it had no legal right to receive. The funds should be recovered from PNC.

Conclusion

Cherokee tried to prevent the improper disbursement of funds. When it appeared that it could not verify entitlement to Priority II funding, it sought assistance from first the DPI and then FFL. When it finally concluded that, despite PNC's assurances that by using the surveys it would qualify, it was not entitled to Priority II funding it filed the subject Form 500 to cancel the

affected FRNs. When in the course of determining that the process used to originally determine the discount rate was flawed, Cherokee discovered that there had been improper contact between PNC and Cherokee, Cherokee filed the subject Form 500.

Cherokee County is a very poor school district in rural North Carolina. Cherokee County has no employee whose full time responsibility is E-rate compliance nor does it have any employee who is familiar with the intricacies of the E-rate rules. As the Commission noted when it granted 196 appeals of funding denials in *Request for Review of the Decision of the Universal Administrator by Bishop Perry Middle School, Schools and Libraries Universal Service Support Mechanism*, CC. Docket No. 02-6, 21 FCC Rcd 5316 at ¶ 14 (2006), the E-rate application process is complicated, and E-rate forms are typically completed by “school administrators, technology coordinators and teachers” and not people with “positions dedicated to pursuing federal grants, **especially in small school districts.**” (Emphasis added). Given this reality, and the fact that E-rate program is essential to poor, rural districts, like Cherokee County, the Commission found in the *Bishop Perry Order* that “rigid compliance” with USAC’s application procedures did not promote the goals of section 254 of the Telecommunications Act of 1996 – ensuring access to discounted telecommunications and information services to schools and libraries.⁵¹

PNC, however, holds itself out as an expert E-rate provider. In every instance of rule violation PNC has been the entity in the best position to avoid the improper disbursement of funds. PNC knew when it requested reimbursement from the SLD and when it accepted disbursement from the SLD that (i) Cherokee might not qualify for Priority II funds; (ii) PNC had

⁵¹ See, also: Requests for Review and Waiver of the Decision of the Universal Service Administrator by Alaska Gateway School District, *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, 21 FCC Rcd 10182 (2006) (extending the *Bishop Perry Order* to cases in which errors were made in filing Form 486).

not installed or maintained any of the internal connections; (iii) the invoices it submitted to Cherokee referenced work it had not performed; and (iv) PNC had delivered no services to Cherokee. Even though, despite emails to and from its employees to the contrary and face to face meetings with Cherokee employees, PNC claims it had no knowledge that Cherokee might not qualify for Priority II funds, the plain fact remains that PNC billed SLD and received funds for services never rendered. Cherokee has never received any of the funds disbursed to PNC nor has it received any benefit⁵² from those funds. PNC, at best, has acted in cavalier disregard for the limitations on Priority II funding and for the FCC's rules and regulations.

While Billed Entities have been made to refund monies received where the Billed Entity incorrectly calculated the discount or where there was improper contact with a vendor during the bid process, Cherokee is unaware of any instance where a Billed Entity was required to pay back funds where the Billed Entity received no services and the Service Provider collected the funds without performance.⁵³

⁵² Except for the call manager

⁵³ The Cherokee situation is very different from where a Billed Entity received services and/or equipment in violation of the rules or where the Billed Entity received services and/or equipment but failed to pay its undiscounted share of the cost.

Therefore, we respectfully request that the Commission order the SLD to accept the subject Form 500 and the Commission order the SLD to recover the disbursed funds from PNC.

Respectfully submitted,

CHEROKEE COUNTY NORTH CAROLINA
SCHOOL DISTRICT

By: _____

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April 12, 2010

CERTIFICATE OF SERVICE

I, Sarah Miller, hereby declare that copies of the foregoing request for review were delivered by hand or sent by U.S. mail, first class postage prepaid, on this day, April 12, 2010, to the following, as required by section 54.721(c) of the Commission's rules:

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